tract at all; and indeed in *Pennsylvania Hospital* v. *Philadelphia*,[15] a rather recent case in the United States Supreme Court, the court unhesitatingly concluded that a subsequent exercise of the power of eminent domain was not defeated by an existing *express* promise not to exercise that power. That the decision in this case reaches a correct result is undeniable. But just why a contrary result would have been reached, if it was an express promise not to exercise the taxing power, is somewhat difficult to see. On the decisions, one could deduce the Supreme Court's attitude to be that the taxing prerogative is of less importance than that of eminent domain,[16] in fact of such less importance that a State can cripple itself in regard to one and not as to the other. Indeed some attempt to distinguish them has been made [17] — but of an exceedingly unconvincing nature. In short, one cannot help but feel that the correct method of dealing with this problem is decisively to refuse to throw the protective mantle of the contract clause over any curtailment *in futuro* of the taxing power. And may the suggestion be ventured that in any reëxamination of the question, *Pennsylvania Hospital* v. *Philadelphia* will play a large part.

JURISDICTION TO IMPOSE A PERSONAL TAX ON ONE NOT DOMICILED BUT PRESENT WITHIN THE STATE. — It is frequently stated as a principle of law, firmly grounded in natural justice and in the authorities, that jurisdiction to impose a personal tax depends on domicil.[1] But whether the duty to pay taxes is incident to the reliance upon a sovereign for protection [2] or arises from the obligation of the members of a community

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[15] 245 U. S. 20 (1917). It is submitted that the language used by Chief Justice White is applicable to the bargaining away of the taxing power.

[16] Mr. Justice Field in Tomlinson *v.* Jessup, *supra*, 458, said: "There is no subject over which it is of greater moment for the State to preserve its power than that of taxation." Mr. Justice Hunt in Erie R. R. Co. *v.* Pa., *supra*, 499, termed taxation "the highest attribute of sovereignty." Mr. Justice Catron in his dissenting opinion in Piqua Bank *v.* Knoop, *supra*, 400, said: "The political necessities for money are constant and more stringent in favor of the right of taxation; its exercise is required to sustain the government. But in the essential attributes of sovereignty the right of eminent domain and the right of taxation are not distinguishable." And in Debolt *v.* Ohio Ins. Co., *supra*, 580, the court said: "This power [of taxation] is not to be distinguished, in any particular material to the present inquiry, from the power of eminent domain. Both rest upon the same foundation — both involve the taking of property — and both, to a limited extent, interfere with the natural right guaranteed by the Constitution, of acquiring and enjoying it."

[17] See Stone *v.* Mississippi, *supra*, 820.

Cooley in his work on CONSTITUTIONAL LIMITATIONS, 7 ed., 400, while admitting that the government cannot bargain away any of its inherent powers, and by no means approving of the doctrine as to tax exemptions, suggests the latter to be reconcilable with the police power and eminent domain cases on the ground that the consideration for such an exemption compensates for the loss in taxes.

[1] See Boreland *v.* City of Boston, 132 Mass. 89, 96 (1882). See Wharton, "Law of Domicil," BOOK OF MONOGRAPHS (1880), 4; JACOBS, LAW OF DOMICIL, § 51; WHARTON, CONFLICT OF LAWS, 3 ed., § 80.

Liability to share municipal burdens seems, in Roman law, to have depended on domicil. See 4 PHILLIMORE, INTERNATIONAL LAW, 3 ed., 33; JACOBS, DOMICIL, § 8.

[2] This is the generally accepted legal theory of the incidence of the duty. See Union

to share its necessary burdens,[3] why is it "naturally" confined to those within the community to whom the artificial rules of common-law domicil[4] apply? Again, is it clear on the authorities that the duty is so limited? Most of the few cases in which the point has been considered involve primarily the interpretation of statutes. They have uniformly construed taxes levied on "inhabitants"[5] or "residents"[6] as applying only to those domiciled within the state, and there are *dicta* that over such alone does the state have authority to impose a personal tax.[7] But there are also *dicta*[8] and at least one decision[9] *contra*. The question is nicely raised in a recent federal case where an Alaska poll tax imposed on a non-resident employed for a few weeks within the territory and admittedly not domiciled there, was held valid.[10] Is this decision to be supported?

There is a fundamental conflict in juristic thought as to the basis of jurisdiction. On the one hand it is claimed that the sovereign's jurisdiction depends on *right* which is determined by private international law. The competency of a jurisdictional act is to be gauged not by the ability of the sovereign to make it effective within its territory but by that conformity to international principles of jurisdiction which will secure its recognition as valid in the courts of other civilized nations.[11] The legal validity of the act is a function of its accord with those rules of international jurisdiction which have come to be recognized and accepted by all civilized states and which no sovereign may dispute so long as it

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Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 202 (1905). See also C. E. Carpenter, "Jurisdiction over Debts," 31 HARV. L. REV. 905, 918.

[3] This conception of the *rationale* of taxation dominates economic and progressive legal thought. See GRAY, LIMITATIONS ON THE TAXING POWER, § 22; MILL, POLITICAL ECONOMY, 5 ed., c. 2, § 2; Report of the Massachusetts Tax Commission, 10 (1885).

[4] In Roman law one might be domiciled in two places in each of which his residence was equally established, using each as a center of business relations. See Wharton, "Law of Domicil," BOOK OF MONOGRAPHS, (1880) 18; 8 SAVIGNY, ROMISCHE RECHT, § 354. This is true also in many European countries to-day with respect to the domestic law of domicil. But local law does not affect international domicil. See WHARTON, CONFLICT OF LAWS, 3 ed., § 77½. Double domicil has been repudiated in the Common Law. Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170 (1839). There are, however, strong *dicta* asserting its possibility. See Pollock, C. B., in *In re* Capdeveille, 2 Hurl. & Colt. 985, 1018 (1864). See also 4 PHILLIMORE, INTERNATIONAL LAW, 3 ed., 47, 48. It is clear that there is nothing inherently natural or necessary in the established doctrines of common-law domicil the definition of which has led to endless conflict in the authorities. See JACOBS, DOMICIL, § 57; DICEY, DOMICIL, Appendix, note 1.

[5] State *v.* Ross, 23 N. J. L. 517 (1852); Boston Investment Co. *v.* City of Boston, 158 Mass. 461, 33 N. E. 580 (1893).

[6] The Chinese Tax Cases, 14 Fed. 338 (1882); Mygatt *v.* Supervisors of Chenango Co., 11 N. Y. 563 (1854).

[7] See State *v.* Ross, *supra*, 521; Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119, 146 (1882). The process by which these courts have reached their conclusions seems rather psychological than logical. Personal taxes being usually imposed on the basis of domicil, courts in interpreting new statutes endeavor to construe them as applying the customary criterion. Through this process the idea naturally but illogically arises that only such statutes as might be so construed could be valid, that domicil *must* be the criterion of the right to impose a personal tax.

[8] See Chinese Tax Cases, *supra*, 344, 345; Cantrell *v.* Pinkney, 8 Ired. (N. C.) 436, 440 (1848).

[9] State *v.* Johnston, 118 N. C. 1188, 23 S. E. 921 (1896).

[10] Alaska Packers' Assn. *v.* Hedenskoy, 267 Fed. 154 (1920). See RECENT CASES, p. 564, *infra*.

[11] See WESTLAKE, PRIVATE INT. LAW, 5 ed., 253; J. W. Walsh, "Meaning of the Term Jurisdiction," 40 AM. L. REG. 346.

remains a member of the community of such states.[12] The intranational and international effectiveness of jurisdictional acts depend alike[13] on conformity to these principles. Acts which contravene them are without legal force not only in foreign states[14] but within the sovereign's own territory.[15] That domicil is essential to personal taxation is such a principle of international jurisdiction. The existence of this principle is evidenced not only by its frequent assertion in the books but also by the fact that personal taxes have been and are regularly imposed on this basis. Furthermore, it is said, it follows from the very nature of the tax, which is levied in return for future benefits and should therefore be imposed only on those who are not merely present but have an "intent to remain," are domiciled, within the state. Taxes laid on any other basis are unjust, exceed the sovereign's jurisdiction; and are altogether void.

In opposition to this viewpoint, it is maintained that the essence of jurisdiction is *power*. Within a sovereign's territory its will is supreme[16] and courts are there bound by its mandates irrespective of their international propriety or effect.[17] Jurisdiction to tax, being thus an incident of the sovereign power to control,[18] naturally extends over all persons within its territory[19] whether domiciled[20] therein or not. The only limitation on the taxing power is to be found expressly or impliedly in the state or federal constitutions.[21] Does the due process clause prevent

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[12] See BEALE, CONFLICT OF LAWS, § 103. See also 21 HARV. L. REV. 354.

[13] Dicey distinguishes between the intra-territorial and extra-territorial competency of courts' jurisdiction. See DICEY, CONFLICT OF LAWS, Am. ed., 362. This theory would deny such a distinction, the first being determined by the second.

[14] Rose *v.* Himely, 4 Cranch (U. S.) 241 (1808); Schibsby *v.* Westenholz, L. R. 6 Q. B. 155 (1870).

[15] See Wallace *v.* United Electric Co., 211 Pa. 473, 476, 60 Atl. 1046, 1047 (1905).

[16] See STORY, CONFLICT OF LAWS, 8 ed. § 18; DESPAGNET, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ, § 19.

[17] See Railroad Co. *v.* Collector, 100 U. S. 595, 598 (1899); United States *v.* Erie R. R. Co., 106 U. S. 327, 704 (Appendix) (1882); State *ex rel.* Beckett *v.* Collector of Bordentown, 32 N. J. L. 192, 195 (1867). See also WHARTON, CONFLICT OF LAWS, 3 ed., § 1 (a).

It may well be questioned whether there is in international law any principle that jurisdiction in personal taxation depends on domicil. In certain German states, taxes are imposed on temporary residents. See WHARTON, CONFLICT OF LAWS, 3 ed., § 80. And in the Swiss Canton of Geneva a capitation tax is specifically laid on those who, though not domiciled within the canton, have lived there for a year. See "Lois du 9 novembre 1887" and "30 mai 1888." See also CERENVILLE, LES IMPÔTS EN SUISSE, 124.

[18] See M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, 428, 431 (1819); Shaffer *v.* Carter, 40 Sup. Ct. Rep. 221, 224 (1920).

[19] See Dewey *v.* Des Moines, 173 U. S. 193, 203 (1898). See GRAY, LIMITATIONS ON THE TAXING POWER, § 44.

[20] "Non-resident" is used throughout this note as synonymous with "one who is not domiciled." Strictly the terms are not synonymous. Domicil requires something more than residence, *i. e.*, intent to remain. See WHARTON, CONFLICT OF LAWS, 3 ed., § 21 (b).

[21] See People *v.* Mayor of Brooklyn, 4 Comst. (N. Y.) 419, 425 (1851); Porter *v.* R. R. I. & St. L. R. R. Co., 76 Ill. 561, 573 (1875). See also 1 COOLEY, TAXATION, 3 ed., 49. It has sometimes been claimed that there are certain limitations on the sovereign power, anterior to and independent of the Constitution, arising out of the nature of free government. See People *v.* Hurlburt, 24 Mich. 44 (1872); Loan Assn. *v.* Topeka, 20 Wall. (U. S.) 655, 662 (1874). It has also been said that there are international limitations of the same nature. See Heathfield *v.* Chilton, 4 Burr. 2015, 2016 (1767).

a tax on non-residents who are within the state for a substantial though temporary period of time? [22] It should not. The protection and benefits secured from the state furnish a just basis for the obligation to contribute to its support. And the mere fact that there is an unfortunate probability of double taxation is not sufficient to invalidate the tax,[23] for this objection might be urged equally with respect to other well recognized forms of taxation.[24] The crucial question is whether the *custom* of imposing a personal tax only at the place of domicil has become a *principle* of taxation so impressed on our practice and theory that a departure from it would be considered by the courts as a revolutionary innovation.[25] This is not the case. The growing tendency is to regard due process as depending not on the form of the tax but on its practical operation and effect.[26] And, practically, such a tax is not a far cry from one on non-residents' credits[27] or income[28] within a

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See also WEISS, DROIT INTERNATIONAL PRIVÉ, VI. But these claims, resting on the old "natural law" idea can no longer be maintained. The legislature is supreme within its constitutional sphere of action. Bertholf *v.* O'Reilly, 74 N. Y. 509 (1878); Orr *v.* Quimby, 54 N. H. 590 (1874). See Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383, 392. See also Roscoe Pound, "Courts and Legislation," 77 CENT. L. J. 219, 226, 229.

[22] See JUDSON, TAXATION, 2 ed., § 480. The provisions of the Constitution with respect to "commerce" and "privileges and immunities of citizens" invalidate a tax on transients. Crandall *v.* Nevada, 6 Wall. (U. S.) 35 (1867); State Treasurer *v.* P. W. & B. R. R. Co., 4 Houst. (Del.) 158 (1870). See GRAY, LIMITATIONS ON THE TAXING POWER, § 168(a). So also taxes discriminating against non-residents. Fraser *v.* McConway & Torley Co., 82 Fed. 257 (1897); Ward *v.* Maryland, 12 Wall. (U. S.) 418 (1870); Travis *v.* Yale & Towne Mfg. Co., 40 Sup. Ct. Rep. 228 (1920).

[23] There is a presumption against double taxation so that express statutory provision is necessary to establish it. See Peoples' Bank *v.* Coleman, 135 N. Y. 231, 235, 31 N. E. 1022, 1023 (1892); Lewiston Water etc. Co. *v.* Asotin Co., 24 Wash. 371, 377, 64 Pac. 544, 546 (1901); Tennessee *v.* Whitworth, 117 U. S. 129, 137 (1885). But such a tax is not contrary to the federal constitution. Ft. Smith Lumber Co. *v.* Arkansas, 40 Sup. Ct. Rep. 304 (1920). See St. Louis Southwestern Ry. Co. *v.* Arkansas, 235 U. S. 350, 367, 368 (1915). And prohibitions of double taxation in state constitutions apply only to cases where the duplicity in taxation arises within the state, not where it is occasioned by the independent taxation of two separate states. Griggsby Constr. Co. *v.* Freeman, 108 La. 435, 32 So. 399 (1902). See 1 WHARTON, CONFLICT OF LAWS, 3 ed., § 80 (a).

[24] Double taxation frequently arises through the operation of succession taxes, taxes on intangible property, or income taxes. The only remedy is through exemptions allowed by interstate comity and the operation of a uniform system of tax laws. See JUDSON, TAXATION, 2 ed., § 490.

[25] There is a tendency to identify due with customary process in taxation. This has been done with respect to the method of collecting taxes. Murray's Lessee *v.* Hoboken L. & I. Co., 18 How. (U. S.) 272 (1855). So also with respect to personal property outside the state. Union Refrigerator Transit Co. *v.* Kentucky, *supra*. And there are *dicta* that custom should determine jurisdiction for personal taxation. See Boreland *v.* City of Boston, *supra*, 96. See also GRAY, LIMITATIONS ON THE TAXING POWER, § 1122. But surely due process involves a more substantial question than that of "good form."

[26] See Shaffer *v.* Carter, *supra*, 226, 227.

[27] United States *v.* Erie R. R. Co., 106 U. S. 327 (1882).

[28] Taxes on the income of non-residents, earned within the state, are valid. Shaffer *v.* Carter, *supra*. The tax may be treated as essentially a property tax. See 32 HARV. L. REV. 168. Consequently it has been held that the income of a non-resident so taxed must have been earned within the state so that it may be said to have a *situs* there. State *v.* Wisconsin Tax Comm., 161 Wis. 111, 152 N. W. 848 (1915). Such taxes have long existed in England. See INCOME TAX ACTS, 1842 & 1853, Schedule D. See also

state.[29] Moreover courts hesitate to oppose the legislative will in the field of taxation,[30] unless that will be impotent, as where the subject matter of the tax is outside the state's power,[31] or perverted where there must be something like a confiscation of property.[32] A tax based on the power of control over a person who through a reasonably extended presence enjoys the protection of the sovereign, falls within neither of these categories and may well be valid.

The conclusions reached from these two conflicting viewpoints as to the nature of jurisdiction, seem, thus, diametrically opposed. But, in the majority of actual cases, it is believed, the practical result would be the same. For in its determination of what constitutes a "reasonably extended presence" [33] requisite for due process under the *power* theory, a court will be guided largely by those considerations of fairness which furnish the motive for the belief that there *is* an international principle that domicil is necessary to personal taxation. In any event, it would seem that there should be a substantial correspondence between the period of presence required and the period for which the tax is levied. The courts here have a large interpretative function and, as in the case of taxation generally, statutes should be construed strictly, against the state.[34] Thus a tax which does not clearly indicate that non-residents are to be included within its provisions should certainly not be so interpreted.[35] And one laid on an "annual" basis, even though expressly including non-residents should not be held to apply to those present within the state for a few weeks only.[36] The tax imposed in the principal case was open to both these objections and cannot be supported under either theory.

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16 HALSBURY, LAWS OF ENGLAND, §§ 1251, 1297. They may be enforced *in personam* if there is a proper service of process. See HALSBURY, *id.*, § 1303.

[29] In practical effect and aside from terminology, what substantial difference is there between taxing a man's wealth because of "financial income" secured within the state and taxing it because of other kinds of "income," material and psychic, resulting from his presence there?

[30] See Nicol *v.* Ames, 173 U. S. 509, 515 (1898); United States *v.* Erie R. R. Co., *supra*, 703, 704; R. R. Co. *v.* Collector, *supra*, 599.

[31] Augusta *v.* Kimball, 91 Me. 605, 40 Atl. 666 (1898).

[32] Cass Farm *v.* Detroit, 181 U. S. 396 (1901).

[33] Difficult questions of the interpretation of ambiguous, and of the reasonableness of clearly expressed statutes, might unquestionably arise. But the situation is not a peculiar one and as elsewhere the court must be guided by general considerations of fairness. Thus it must decide as to "reasonable notice" or "reasonable regulations." See Roller *v.* Holly, 176 U. S. 398 (1899); Kane *v.* New Jersey, 242 U. S. 160 (1916).

[34] Gould *v.* Gould, 245 U. S. 151 (1917). See Crocker *v.* Malley, 249 U. S. 223, 233 (1918); Williams *v.* Singer, [1918] 2 K. B. 749, affirmed on appeal, [1919] 2 K. B. 108, and in the House of Lords, 123 L. T. R. 632 (1920).

[35] Thomson *v.* Advocate General, 12 Clark & Fin. 1 (1845); Commonwealth *v.* Standard Oil Co., *supra*.

[36] It is possible that "annual" might be used in a procedural sense to indicate the time at which the tax will be collected. But the better view is that it is intended to indicate the period of benefit from which arise and to which corresponds the obligation to pay the tax. In fact all modern taxes are laid on such an annual basis. The courts have so interpreted the word in statutes. Hays *v.* Pacific Mail S. S. Co., 17 How. (U. S.) 596 (1854). See Chinese Tax Cases, *supra*, 345. See also Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 586, 598.